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Neo-Grotian Predicaments: On Larry May's Theory of International Criminal Law

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Abstract:

This review essay strives to cast a critical, yet admiring, look at Larry May's project of delivering a normative foundation for international criminal law. I start by summarizing the main arguments in three books and then isolate a few key themes that run through all of May's writings: moral minimalism, natural law and defendant-orientation. The final part of the paper points to possible objections to May's overall project. These objections are grounded in the observation that – despite its unique breadth and sophistication – May's endeavour lacks an appreciation of the political dimension of international law. This charge is not necessarily meant as a fundamental challenge to the project, but rather as an argument to the effect that even the most elaborate system of thought contains blind spots that might warrant justified criticism.

Biographical note:

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by a Marie Curie Career Integration Grant (2013-2017). Thaler's recent publications have appeared in *Analyse & Kritik*, *Contemporary Political Theory*, *Critical Review of Social and Political Philosophy*, *European Journal of Political Theory* and *Philosophy & Social Criticism*. He is the author of *Moralische Politik oder politische Moral? Eine Analyse aktueller Debatten zur internationalen Gerechtigkeit* (Campus, 2008).

I. On the Project's Systematic Nature¹

The purpose of this review essay is to cast a critical, yet admiring, look at what can only be described as today's most ambitious attempt to infuse the Just War tradition with new and much-needed lifeblood: Larry May's extensive work on the normative foundations of international criminal law surely marks a milestone in the academic debate. The sheer scope of the project is staggering. May has managed to comprehensively address virtually every problem in this debate: from the crimes prosecuted at Nuremberg – war crimes (2007), crimes against humanity (2005) and crimes against peace (2008) – to genocide (2010), due process (2011) and transitional justice (2012). Even a quick glance at the pages of this multi-volume project will surely reveal that May has provided us with what can only be called, perhaps somewhat emphatically, a *system of thought*.

Before delving into the more detailed discussion, a word on the very nature of May's endeavour. Its systematic design makes it the kind of project that will be of relevance to a wide range of audiences in academia, and possibly even beyond: from legal theorists, to international lawyers, political philosophers and historians of political thought – they all have something to learn from these books, no matter whether they

¹ This review essay is based on a presentation given at the occasion of a workshop around Larry May's writings at the University of St. Andrews (2013). I wish to thank the organizer, Anthony Lang, for the kind invitation to participate in the event, and for the ongoing conversations around topics of common interest. I am also grateful to Cian O'Driscoll and Larry May for their thoughtful and generous responses to my presentation. Finally, I want to express my gratitude to Patrick Hayden for his editorial comments on this paper. The usual disclaimers apply.

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will ultimately find themselves in complete agreement with May's conclusions or not. The reason for this broad appeal is rather simple: those who generally share May's understanding of international criminal law will be delighted to realize that he has outlined and defended the most comprehensive statement of their preferred position thus far. Those, on the other hand, who are perhaps less convinced by the general framework of May's thinking about international criminal law, will be equally pleased to finally find a coherent and elegantly argued position to argue against. This is, to put it in a nutshell, grand theory at its best, both in its philosophical aspirations and in its scholarly tone.

Given its systematicity, May's project is premised on a number of key assumptions, which I will attempt to reconstruct and critique in the subsequent sections.² I shall structure my observations as follows: Section II will summarize, with a very broad brush, the main arguments of three books – on aggression, genocide and *jus post bellum*. The reason for this focus on just these writings is that a more encompassing engagement with the whole oeuvre would by far exceed the limits of what can be achieved in a normal review essay. Section III highlights the main suppositions on which May's arguments rest. In this part of the essay, I shall also draw on publications other than the three books highlighted above. Finally, in Section IV, I will try to excavate some of the fault lines in this grand theory, by sketching potential objections to May's ideas. While I am generally sympathetic to the overall project, I wish to emphasize the contestability of some of the basic assumptions on which his system of thought builds.

² Another review essay of May's work has focused on the distinction between the project's moral and legal implications: (Kelly 2010)

II: Aggression, Genocide, and *Jus post Bellum*

The first book – *Aggression and Crimes Against Peace* (May 2008)– hones in on the crime of aggression in international affairs. May examines the salience of the classical reasons for waging a war under the Just War doctrine. These *jus ad bellum* principles have, as Michael Walzer argued in his game-changing *Just and Unjust Wars* (2006), in modern days boiled down to defensive wars against aggression. Aggression has traditionally been defined, under Walzer’s so-called “legalist paradigm”, in terms of violating a state’s territorial integrity and political sovereignty. Thus, an aggressor can be identified as launching a “first strike”, against which repercussions are legitimate. May believes that this interpretation of aggression is mistaken because it pays too little attention to human rights violations. Instead of emphasizing an aggressor’s first strike against the territorial integrity and political sovereignty of another state, we should rather speak of a state’s “first wronging”. (May 2008, pp.216–218). The only wrongs that justify, on May’s account, the waging of war are human rights violations. Thus, if a state intervenes to stop human rights violations in another country by military means, this would not and should not be labelled as an aggressive war. Apart from this re-interpretation of how we ought to see aggression, May also interrogates who should be prosecuted for the crime of aggression. Here, he pleads for limiting the prosecution of the crime of aggression to state leaders, while suggesting that lower-ranking military personnel should be left unscathed.

May’s intervention into the debate about aggression strikes at the heart of the contemporary controversy around *jus ad bellum* principles. Indeed, his refutation of the hitherto sacrosanct cornerstones of territorial integrity and political sovereignty

has been endorsed by many commentators, who found Walzer's legalist paradigm implausible due to its heavy reliance on the domestic analogy between individuals and states. This raises two concerns: First, whereas *Aggression and Crimes Against Peace* deals with one of the most important topics in the debate around the use of force today, May does not attempt to link his thinking about aggression with the conversation around the "Responsibility to Protect". In his later writings, May tackles the "Responsibility to Protect" more extensively (May 2012, pp.124–142), but it would have been useful to see references to this emerging doctrine in the context of the crime of aggression as well. Secondly, another curious lacuna concerns the influential and important theory of David Rodin (2002; 2006), who has delineated very similar arguments about the changing relationship between the rights of states and the rights of individuals: although May points to Rodin's contribution in two footnotes (May 2008, pp.4, 215), he does not try to explicate in what ways his own account deviates from this liberal theory.

The second book under closer scrutiny here, *Genocide: A Normative Account* (2010), seeks to offer a solution to core conundrums that have befuddled the philosophical debate around genocide for some time now.³ This book contains five parts, which are all organized around crucial puzzles. The first part considers criteria by which one may establish what groups ought to be protected by the Genocide Convention. The second part investigates the harm that is done by genocidaires. May argues that genocides target the status of individuals (as well as their lives) in that they typically destroy various forms of symbolic and material recognition of individual autonomy. The third part considers both acts of genocide that are sometimes not included in the

³ This book has attracted a significant number of reviews, on which I draw in the following discussion: (Vernon 2011; Kukathas 2011; Smith 2010)

standard legal definition (such as ethnic cleansing) and the intentions behind it. The fourth part looks at perpetrators and how they should be punished. May also directs our attention to the important dimensions of complicity and incitement. The fifth and final part looks at a number of specific problems related to genocide: humanitarian interventions and criminal trials.

May's account is a philosophically refined effort to salvage the notion of "genocide" from some of its metaphysical confusions. Like Claudia Card in her innovative characterization of genocide as social death (2003), May seeks to clarify the concept by working on the definition such that it withstands serious probing.⁴ This leads him to suggest that the narrow account of groups of in the Convention needs to be adapted in light of a "nominalist" understanding of the constitution of collectives. (May 2010, pp.30–31). His conclusion is that genocide does not represent the "crime of crimes" (May 2010, p.78) in global politics; rather it should be seen as morally comparable to the other serious crimes.

What May does not really consider, though, is that the very act of defining an act as genocidal can and will become politicized. As Henry Theriault has persuasively shown (2010), the crux of the issue is that a simple search for a better definition will not necessarily assist us in the practical struggle against genocidaires. In fact, any definition is liable to perversely become the negative "benchmark" against which perpetrators will try to model their actions so as to evade prosecution. This dialectical movement between defining an act of violence as genocidal and the emergence of new acts of violence is a problem that has so far received scant attention. But I would

⁴ In this respect, May's work echoes the recent attempts of analytical philosophers to grapple with the notion of genocide. See: (Abed 2006; Boghossian 2010)

maintain that ignoring this political dimension of the debate around genocide is rather consequential. (See: Thaler 2014)

The final book I wish to quickly review here grapples with the question what ought to be done *After War Ends* (2012). In this text, May engages with issues of *jus post bellum* – a part of traditional Just War theory that has only recently started to receive the attention it deserves.⁵ May outlines a number of vital principles that ought to guide states in their attempts to establish a peaceful future. These principles include proportionality, rebuilding, retribution, reconciliation, restitution, and reparation. May analyzes each principle in depth, by developing a number of concrete guidelines for what should, morally speaking, be done once the violence has stopped.

Although the majority of the principles outlined by May have been examined by many political theorists and social scientists working on transitional justice (Elster 2004; Gready 2011; Roht-Arriaza & Mariezcurrena 2006; Teitel 2000), I concur with Cian O’Driscoll (2013) that the most original contribution of this book is the discussion of *meionexia*. Drawn from Aristotle’s catalogue of the virtues, *meionexia* refers to a disposition to accept less than one is due. May submits that this disposition can offer a key to reconciliation (May 2012, pp.88–89), insofar as it might pave the way for a culture of respect and cooperation in which both perpetrators and victims constructively partake.

After War Ends, just like the other two books discussed here, contains many insights that have the potential to move the debate around *jus post bellum* forward. However, it is rather striking that May is disinclined to engage with the vexing dilemmas of

⁵ For some important publications see: (Bass 2004; Orend 2000a; Österdahl 2012)

reconciliatory politics in the real world. The short section on Truth and Reconciliation Commissions (TRCs) is rather telling in this respect. (May 2012, pp.98–99) While it has been argued that TRCs can at best be legitimized in terms of a “principled compromise” between justice and reconciliation (Allen 1999; Dyzenhaus 1999), May appears to believe that the principles of *jus post bellum* (proportionality, rebuilding, retribution, reconciliation, restitution, and reparation) will themselves be conducive to changing the behaviour of former enemies. From reading May’s account of transitional justice, one thus does not always get a sense of the centrality of the political conditions under which settlements are reached. The author might respond to this objection by underscoring the book’s subtitle: the book, after all, offers a *philosophical perspective* on the normative issues surrounding *jus post bellum*. But I wonder how efficacious such a pointer would be, given that any resolution of these issues is deeply shaped by the context within which it occurs.

Section III: Key Assumptions and their Normative Foundations

As outlined in the introduction, one needs to acknowledge the systematic nature of May’s project to make sense of its constitutive parts. One way of elucidating this system of thought further is by scrutinizing the normative foundations on which the theoretical edifice rests. One of the background assumptions of the project is that “[i]nternational law and the Just War tradition share many things in common, and perhaps the most important is the general condemnation of war and yet the recognition that war may be justified or excused in certain cases.” (May 2008, p.9) From the outset May hence assumes that there is a common ground – the repulsion against violence – on which both international law and the Just War tradition are

based. Both are, in other words, “contingently pacifist” – they take off from the assumption that the conditions of waging a Just War in the real world are almost never satisfied. (May 2008, pp.33–37)

This is the reason why May remains throughout his writings highly skeptical of legal positivism. Although the books reviewed here testify to May’s profound and sophisticated knowledge of international criminal law, he never takes the legal standpoint for granted. For May, it is the Just War tradition – or, perhaps more correctly, a particular reading thereof – that contains important insights into the normative foundations of international criminal law. In fact, one often has the impression that he believes the authors of the Just War tradition speak to us directly, unmediated, and without distortion. Grotius in particular is frequently called upon as the main proponent of a “minimalist natural law”. May’s reference to the genealogy of Just War theory in this context is rather exceptional in the current debate. It reminds us that international law has a pre-history, which to certain extent impacts on, and even determines, its configuration in our days.⁶

But May’s turn to the Just War tradition also invites some objections regarding its temporal focus and its cultural grounding. The exclusive concentration on natural law theorists makes it inevitable that many authors in the European history of political thought before and after the 17th century are entirely omitted. It comes, for instance, as a slight surprise to learn that Immanuel Kant plays only a minor role in May’s project. (May 2012, pp.56–57) The reason for this absence certainly has, at least partly, to do

⁶ Although they otherwise do not share many viewpoints, this creative engagement with the historical canon reveals a similarity between May’s oeuvre and Martti Koskenniemi’s writings, in particular his seminal *The Gentle Civilizer of Nations* (2002b).

with the fact that it is not intuitively evident whether Kant belongs to the Just War tradition at all.⁷ And yet, it is remarkable that the author of *Perpetual Peace* receives so little consideration in this multi-volume project. We might, of course, explain this simply in terms of an intellectual preference – not everybody has to be a Kantian, after all. But the heavy reliance in Grotius and Hobbes, as we shall see, has some important implications for the standpoint from which international criminal law is reconstructed.

Secondly, as regards the wider cultural context within which May locates the Just War tradition, some doubts are warranted as well. If the main authors in the Just War tradition are all Europeans, what does this mean for the presumed universality of the normative foundations that this tradition may engender? One of the potential desiderata in May's approach is that it assumes too much of a Eurocentric perspective in drawing on the idea of a Just War. May never strives to go beyond the well-established canon of European voices in this tradition. While there can be little doubt that the most influential accounts of Just War have their origins in Western, or more specifically, Christian history (O'Driscoll 2008; Rengger 2013a; Rengger 2013b; Rengger 2002; Reed & Ryall 2007), there are indications that a comparative assessment of Just War traditions – in the plural – would yield interesting results, from which any engagement with the ethics of warfare could benefit. (Ilesanmi 2000; Robinson 2003; Sorabji & Rodin 2006) It might be worthwhile to gesture at the prospect that a culturally more diverse outlook can enhance the project of constructing normative foundations for international criminal law through an engagement with the Just War tradition. If it were possible to compellingly show that

⁷ For an argument to incorporate Kant into the canon of Just War theorists see: (Orend 2000b; Orend 2004) For a vigorous rejection of this idea see: (Williams 2012)

other cultures beyond the Western, Christian canon contained resources for thinking through the permissible use of force, this would surely strengthen the case for a normative theory that aspires to be universal.

In the next step, I shall turn to May's interpretation of the law. I will begin by trying to isolate three core themes that run through his extensive oeuvre. These themes are (a) the idea of moral minimalism, (b) the relation between secularized natural law and positive law, and (c) the defendant-based perspective on criminal law.

III.1. Moral Minimalism

A thread that runs through Larry May's work is that its main positions are upheld by "moral minimalism". We encounter this claim in several of his books. Here are some characteristic passages. In *War Crimes and Just War*, May defines moral minimalism in the following way:

"Minimalism is meant to be deflationary in two respects: It is supposed to minimize the number of assumptions that one begins with and then minimize the likely objections to the place where one starts. Indeed, my account aims to be explicitly minimalist in the latter sense, for I seek minimal starting assumptions that are the least controversial that I can find. Toward this end, I start from principles of peace and security." (May 2007, pp.57–58)

In *Crimes Against Humanity*, May captures moral minimalism in terms of the limits it imposes on state behavior:

"[M]oral minimalism holds that there are basic moral rights that undergird the system of mutual forbearance. [...] Moral minimalism holds that when States

act so as to undermine their subjects' security, a moral minimum of acceptable behavior by States has been violated, and it may not be unjust for international tribunals to take action that would otherwise be unjust violations of a State's sovereignty." (May 2005, p.32)

And finally, in *Aggression and Crimes Against Peace*, he sets off by stating that:

"In this work, as in my other books on international criminal law, I will take a moral minimalist approach. I will proceed from a position that seeks the least controversial assumptions – that is, assumptions that might achieve international consensus." (May 2008, p.17)

So, moral minimalism is on the one hand a view on the status of norms: some goods, such as peace and security, are of such importance that they ought to be protected by norms that are shared by all human beings. These goods are the "least controversial" ones, and we might hope to elicit an international consensus on their protection. On the other hand, moral minimalism also provides us with critical tools to assess the behavior of states. There is a threshold enshrined in moral minimalism that states must respect – otherwise they forfeit their right to self-determination.

I take it, then, that the purpose of appealing to minimalism is to garner as wide support as possible for the normative foundations of international criminal law. May seeks to achieve this by appealing to the two forefathers of his system of thought, Hobbes and Grotius. These two authors are clearly the main sources of inspiration when it comes to defending moral minimalism through substantial arguments. This can be demonstrated by quickly looking at a few passages. In *War Crimes and Just War*, Grotius plays a crucial role through his ideas on "humane treatment". May

draws on the Dutch jurist and statesman to place “humane treatment”, and not “justice”, at the heart of humanitarian law. Humaneness and mercy in war can ultimately be grounded by reference to natural law:

“Grotian natural law has to do not only with what conduces to our own preservation and interest directly, but also to what conduces to the good of others. The sociableness and friendliness that are so crucial for a Grotian understanding of natural law lead to rules of engagement in war that are not merely based on what is necessary for the survival of a State or a given soldier, even one fighting for a just cause.” (May 2007, p.55)

Hobbes, on the other side, is particularly important in *Crimes Against Humanity* (May 2005) and in *Genocide* (May 2010). In *Crimes Against Humanity*, May converses with Hobbes in order to develop a defense of international law by drawing on the following, bifurcated principle: “Seek peace where you can, and otherwise be ready to resort to war.” (May 2005, p.17) May’s reading suggests that Hobbes may offer a foundation for international law by way of referring to natural law. This interpretation goes against the grain of the majority of the scholarly literature, which greatly underscores the crucial distinction between positive and natural law in Hobbes. It is therefore apt that May calls his interpretation “non-standard” (May 2005, p.17). In *Genocide*, Hobbes is relevant for an entirely different reason: his nominalism serves the purpose of construing groups “as artificial persons, at least for purposes of understanding them as agents” (May 2010, p.30).

What stands out in May’s engagement with these historical authors is his willingness to grapple with Grotius and Hobbes as if they were contemporary partners in the debate about Just War and international criminal law. This strategy naturally invites

the criticism of being anachronistic, and it is undeniable that May's turn to the history of political and legal thought is mainly motivated by an interest in the problems we face today. However, it should be acknowledged that treating both Grotius and Hobbes (as well as many other historical authors) as quasi-contemporaries has the advantage of connecting Just War theory with its ideological roots. In opposition to the anodyne and a-historical musings of analytical Just War theory, May seems fully aware of the tradition's intellectual resources. Aligning his own system of thought with Grotius has the consequential effect of favoring a particular strand within Just War tradition – what has been called “legalism” (Bellamy 2006, pp.8, 71–75). The effects of May's endorsement of the legalist strand within Just War will concern us later.

III.2 Natural and Positive Law

The substance of May's moral minimalism is fleshed out by a specific interpretation of natural law. The best exposition of this interpretation can perhaps be found in *War Crimes and Just War*, where May clearly states that a particular kind of natural law is the source of universal moral principles. Consider the following quote, which is taken from a discussion of restraints on what we ought to permit during warfare:

“Just War theory was intimately connected to natural law theory, with its central idea that there were universally binding moral obligations that transcended culture, historical epoch, and circumstance. While many versions of both Just War theory and natural law theory have been proposed, it seems to me that Grotius was right that the most plausible approach admits the least

number of principles or, put differently, that has a minimum of moral principles that are proposed.” (May 2007, p.8)

Other books derive their moral foundations from natural law as well. The point of referring to natural law is to develop a form of ethical reasoning that will provide critical tools for understanding and correcting positive law. The conception of natural law, which May employs throughout his project, is both minimalist and secular:

“Minimalist natural law theory derives norms from features of human nature that are the least controversial. So, unlike traditional natural law theory, minimalist natural law theory does not proceed from a robust listing of all the features that might ground basic goods for humans. Rather, there is a very short list (two or three features) of human nature that set the ground for a very small set of norms.”(May 2007, p.58)

This conception of natural law allows May to take a critical position vis-à-vis positive law. It helps him to identify and remedy deficiencies in historical and contemporary international law governing warfare. The minimal and secular version of natural law is therefore the substantial basis for the morality discussed above. Although he never expounds on this notion, May also puts special emphasis on the secular character of his vision of natural law, which indicates that the interweaving of religion with natural law is a somewhat problematic heritage of the natural law tradition.

III.3 Defendant-Oriented in International Law

The final topic I wish to highlight concerns the orientation towards defendants, and not the victims, in May’s account of international criminal law. In regard to general discussion of aggressive wars, May states:

This is a pre-print/pre-proofread draft.

“I take a defendant-oriented approach to the questions of which individuals should be prosecuted, and by what criteria, for the waging of aggressive war. The vast majority of literature on international criminal law is victim-oriented. To a certain extent this makes sense. The perpetrators of aggressive wars are some of the worst of offenders [...] [W]e should proceed with caution and respect for the rights of these leaders, since extreme reactions often generate abuse or at least neglect the possibility of innocence on the part of those who are strongly vilified.”(May 2008, p.19)

May’s approach to war crimes is motivated by a similar orientation towards defendants (May 2007, pp.3, 16), and so is his engagement with crimes against humanity (May 2005, pp.4, 92). This concern for the defendants has far-reaching consequences for the whole project of providing normative foundations to international criminal law. The rule of law underpinning this project requires us to abstract from the horrible crimes the defendants have presumably committed. There is, on May’s account, no alternative to this concern for the defendants if we truly believe in an international criminal law.

IV. Possible Objections

My final comments will circle around possible objections to May’s project. I need to emphasize at the beginning of this section that these objections are “external” ones. They do not address specific issues of justification, but rather the project’s general framework. In that sense they might appear at some distance to the immediate concerns driving May’s project.

IV.1 Against Moral Minimalism

The first objection is to do with May's endorsement of "moral minimalism". As we have seen, the purpose of moral minimalism is to discover normative foundations for international criminal law that are the least controversial.⁸ To this move one could object that moral minimalism in international relations suffers from a number of shortcomings. (Buchanan 2004, pp.38–43) The most important of these shortcomings seems to be that minimalism itself rests on a controversial empirical assumption on the impossibility of agreement. Is it really the case that agreement on international criminal law could only be achieved if we predicate it on some form of "minimal morality"? Or could agreement emerge differently, through the slow and often painful negotiations that are the hallmark of a *modus vivendi* in international relations?

One possible way of tentatively answering this question is by reference to Charles Taylor's distinction between three ways of dealing with cultural and religious pluralism: the "common ground"-strategy, an "independent ethic" and the appeal to an "overlapping consensus". (Taylor 1998) Taylor argues that, when faced with deep and persistent disagreement over fundamental principles of social organization, we may choose to endorse the position that a viable set of fundamental principles will result from the real beliefs held by the members of a society. This "common ground"-strategy thus focuses on what is actually shared by people, and tries to exclude those beliefs that are held by only a minority of people.

This can be contrasted with the "independent ethics"-strategy, which Taylor associates with Grotius as well. Here, the goal is to devise a morality that is

⁸ For an alternative criticism of moral minimalism see: (Luban 2006)

completely independent from what the members of society really believe. The upshot of such an independent ethic is that fundamental principles of social organization remain immune from actually occurring conflicts over the good in society. The paradigmatic case of such an independent ethic is, of course, Rawls's notion of "public reason" (Rawls 2005).

Taylor then goes on to argue that each of these ways of engaging with cultural and religious pluralism is problematic. The "common ground"-strategy becomes less attractive the more pluralistic a society looks, as it will be very difficult to still find an area of sufficient agreement when people hold widely divergent beliefs. Simply put, the common ground will grow increasingly thin once many different people try to stand on it. On the other hand, in abstracting from actually existing beliefs, the independent ethic will necessarily favor those in society who are atheists or agnostics. Therefore, the independent ethic is necessarily biased against believers, Taylor submits – an objection which has indeed been raised against Rawls's account of public reason (Bader 2007; Stout 2004). While being independent in the sense of "freestanding", it is not, and it cannot be, neutral in its effects on society.

This leaves the path open for a third option, which Taylor calls "overlapping consensus". Again drawing on and modifying Rawls, Taylor suggests that we need no consensus on the foundations of society – all we need is an acceptance of rules in light of the "comprehensive doctrines" individual members of society endorse. Taylor departs from the "independent ethic"-option in that he does not require citizens to fully abstract from their idiosyncratic belief systems. Neutrality is an illusion when it comes to justifying social organization. This is why citizens only need to accept the

rules on which society rests, but they are not required to reach a deeper consensus on their normative foundations.

This debate about cultural and religious diversity has, I would like to propose, ramifications for May's embrace of "moral minimalism". It appears obvious that May suggests the equivalent of an "independent ethic" for international criminal law. The numerous references to minimal and secularized natural law point in this direction. However, in accordance with Taylor's critical remarks, we might suspect that May's account of minimalism is unlikely to be less partial and partisan than other visions of morality. It is fairly clear that May favors a particular, albeit parsimonious, vision of morality. But even an extremely thin form of morality, one that concentrates solely on peace and security, expresses, of course, a specific view of the good. Therefore I think it is disputable whether the argument for minimalism will necessarily be less controversial than any other appeal to a "comprehensive doctrine" (to use Rawls's words once again). Moral minimalism cannot evade disputes about which goods are primordial. While we may concur with May that maintaining peace and security are indeed very important, it is not evident that this list pays tribute to the diversity of beliefs over what is fundamentally good to a great variety of people. My comments on May's notion of moral minimalism are thus directed not at the *content* of his theory of international law, but at its *derivation*.

IV.2 Against Natural Law

In regard to natural law, my reading will be informed by Judith Shklar's reflections on "legalism", and the implied critique of natural law theories.⁹ Shklar defines legalism as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules" (Shklar 1986, p.1). Adherents to natural law as well as positivists are, on Shklar's account, driven by legalism in this sense. I shall specifically focus in Shklar's attack on natural law, although she was even more vocal in her rejection of positivism. Shklar was generally skeptical of the idea that we possess a sufficiently universal account of human nature that would allow us to ground law. The fact that human nature is essentially contested can be easily gleaned from the various debates within the natural law tradition:

"One of the delights of those who do not happen to be partial to natural rights theory is to sit back and observe the diversity and incompatibility among the various schools of natural law, each one insisting upon its own preferences as the only truly universally valid ones. There have by now been sufficient number of listings of the contents of typical natural law theories to make a new one superfluous."(Shklar 1986, p.68)

Shklar was entirely aware of the appeal of natural law in times of crisis and of totalitarianism: natural law can, after all, provide us with moral rules for resisting "unjust laws". But it is characteristic to natural law theories that they conceive of such moral rules as emanating from a "higher law" that may be called upon to trump positive law. Shklar claims that the historical context within which natural law

⁹ The idea to turn to Shklar in discussing Larry May's work, came to me after reading a thus far unpublished paper by Samuel Moyn, to which the following paragraphs owe a lot: (Moyn 2012)

theories have emerged was shaped by the decidedly anti-democratic “subject-ruler relationship of our monarchical past” (Shklar 1986, p.71). Only in this context can the notion of a natural law of resistance gain traction. When the monarchical ruler dictated what the content of positive law was, the subjects needed a reference point that transcended the ruler’s power in order to challenge his laws.

In modern times, Shklar suggests, natural law theories are structurally obsolete because the citizens of today’s democracies are no subjects to a monarch anymore: what is needed to uncover “unjust laws” is not an account of human nature invested in a transcendent being (God), but more pragmatically “a critical and independent attitude among citizens in general” (Shklar 1986, p.72). Since today a critical and independent assessment of all laws does not depend on the appeal to a higher instance than the monarch’s power, referring to natural law is rather less potent than some would like to believe. What is more, as Shklar demonstrated with regard to the Tokyo trials, natural law is far from innocent when it becomes the basis of prosecuting war criminals:

The assumption of universal agreement served here merely to impose dogmatically an ethno- centric vision of international order. It was the claim that these universal rules were “there” - the assumption of general agreement, which was so contrary to the cultural realities of the situation - that made the application of natural law seem both arbitrary and hypocritical under these circumstances. (Shklar 1986, p.128)

In her attack on both naturalism and positivism, Shklar mainly proposes that these theories misunderstand the fundamentally instrumental and political character of law. Law and legalism are, first and foremost, means to a political end. (Moyn 2012, p.2)

Now, this does not imply that law and legalism cannot be forces of justice in society – it just always depends on what the end is to which law and legalism are the means. Shklar’s insight therefore should not be discarded on the grounds that it fails in defending a liberal politics. For Shklar, liberalism can and should openly acknowledge the many uses law may fulfill in its defense. But in order to do this, we would be mistaken to conceive of the law as wholly freestanding and independent from politics.

What are the implications this view has for international criminal law? It should be clear from my recounting of Larry May’s approach that his ideas about international criminal law are decidedly anti-instrumentalist. The very idea of proffering foundations for international criminal law is inimical to the notion that law is primarily a means to an end. And it seems fair to say that this anti-instrumentalist vision of international criminal law is today hegemonic in academic circles debating contentious issues such as the role of the International Criminal Court in global politics. Few commentators (with the notable exception of some political scientists and critical legal scholars) deal with international criminal law from a political perspective. (Alter 2014; Koskeniemi 2002a) Most scholars celebrate the establishment of the institutions of international criminal law as an achievement in itself, which should be seen as a victory over the intricacies and conflicts of global politics.

But on Shklar’s account, this is exactly the wrong way of seeing processes of global justice: what we need instead is a thoroughly political analysis of what law and legalism do in fact achieve – and what they ought to achieve. A “Shklarite” vision of international criminal law would hence emphasize the malleable and creative

potential of the rule of law in the international realm. So, applied to May's narrative, one might object that his view of law in general lacks a distinct appreciation of the political (and ideological) dimension of international criminal law.

IV.3 Against Defendant-Orientation

Finally, some scattered comments on defendant-orientation. May is adamant about how he sees his preference for defendant-orientation: as complementary to the prevailing mode of victim-orientation in international criminal law. May wants us, often against all instincts, to uphold the presumed innocence of the defendants according to the rule of law. However, let me first remark that it is not entirely obvious to me that his claim about the current debate's "bias" towards victims is correct. It is nowadays well-established that the increasing focus on victims in criminal trials ought to be seen as an important development that promotes the good of enfranchising and empowering those who have been targeted by victimizers.¹⁰ What is more, particularly in transitional justice projects, victims are not relegated to the status of witnesses; rather they are recognized as worthy of respect by giving them the opportunity to speak of the injustices they endured and by enabling them to take ownership of the justice process itself.¹¹

Therefore, I am not entirely convinced that the focus on victim-participation needs to be counterbalanced at all. Obviously, this claim does not imply that the way victims are treated in transitional justice projects is always and necessarily unproblematic.

¹⁰ See for instance: (Bassiouni 2006) For a deflationary and skeptical position see: (Trumbull 2008)

¹¹ On the difficult status of witnesses at the Hague tribunal see: (Stover 2005)

Many commentators have underscored that victims can under certain circumstances become re-traumatized during the hearings of TRCs or international tribunals.

(Mendeloff 2004; Mendeloff 2009; Brounéus 2008) However, I would still suggest that, if we accept that international criminal law serves goals that are inherently political, enfranchising and empowering the victims must be high on its agenda.

While it might make sense to also guarantee defendants' rights, I believe that there are good reasons why victim-orientation is so prominent in contemporary theory and practice.

Defendant-orientation, though, is likely to be criticized for being conservative in that it severely restricts the mandate of the institutions of international criminal law. Let me explain why this is the case. When reading his books, one cannot resist the conclusion, drawn by Jamie Terence Kelly (2010, pp.506–508), that May opens up a considerable gap between what we should morally condemn and what we can criminally prosecute. This move is largely connected to May's conception of collective responsibility, which has been pivotal to his earlier work. (May 1992) All the crimes that May discusses in his work on international criminal law are, of course, collective in nature. This raises quite generally the question whether and how we should prosecute individuals who partake in collective action to commit these crimes – how “small fry” should be linked to “big fish” (Osiel 2009, pp.8–9). May argues that collective liability is a concept ill-suited for international criminal law. (May 2008, p.186) In wartime, many people are subject to moral condemnation for what they do – those who are complicit in, and conspire to waging an aggressive war, for example. But few of those people, May suggests, should be criminally prosecuted for their actions. Usually, only those at the very top of the chain of command – state leaders – will be legitimate targets for criminal prosecution on the international realm.

In sum, May's defendant-orientation has the consequence that he prefers a restricted scope of international criminal law. This is, quite obviously, completely at odds with the high moral stakes set out by May's "contingent pacifism". As Kelly has argued, this leads to the situation that May "seems committed both to the view that all wars are morally wrong, and to the belief that hardly anyone should be held legally accountable for starting wars" (Kelly 2010, p.508). The reason for May's restrictive approach to who should be criminally prosecuted is to do with his concern that a more robust mandate for the institutions of international criminal law, such as the ICC, would lack consensus. But one can be skeptical, as we have seen, whether recourse to an "independent ethic" really is optional for international criminal law, and whether we can in fact ever reach an agreement on the foundations of criminal law. Rather, the alternative perspective outlined by both Taylor and Shklar would be to openly acknowledge the political character of international criminal law, and to then work towards generating an "overlapping consensus" on the political ends, which the law ought to serve.

V. Final Remarks

To summarize the main points this essay has ventured to defend:

First, I have suggested that the quest for a minimal morality might be mistaken because what counts as "minimal" is itself open to discussion and contestation. Even the most anodyne vision of human nature will be the expression of a particularistic vision of the good. I have contrasted moral minimalism with pluralistic theories that

do not aim to provide a definite (albeit very short) catalogue of universal goods in need of protection.

Secondly, I have suggested that Judith Shklar's notion of "legalism" might open up an interesting perspective from which international criminal law could be reconstructed differently. From this vantage point, Larry May's work is at fault to account for the political and instrumental dimension of law.

Thirdly, I have maintained that the focus on defendants, and their rights in trials, has the consequence of severely restricting the mandate of the institutions of international criminal law. The quest for a consensus among participating states pushes May to create a considerable, and some might even say undue, gap between what is morally condemnable and what is criminally prosecutable.

As anticipated in the introduction, all these issues ultimately point towards the big question looming in the background of this review essay, namely how May thinks about the *politics* of international criminal law. It seems to me that if one were to interrogate May's project further, this would be a promising point of departure.

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